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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1521

ANTHONY GIORDANO,
Petitioner,

v.

HARRY J. LEE, EDWIN ROTH and ROEY STETSON.

JAMES GIAMMANCO,
Petitioner,

v.

CHARLES McKEONE and WILLIAM BROWN.

JAMES GIAMMANCO,
Petitioner,

v.

HARRY J. LEE and JOHN WEINGART.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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INDEX

Page

Opinions Below 2

Jurisdiction 2

Questions Presented 2

Constitutional Provisions, Statutes and Rules of Court Involved 3

Statement 5

Reasons for Granting the Writ 22

Conclusion 46

Appendix A. Opinion of Court of Appeals, dated December 4, 1970 ..... A-1

Appendix B. Judgment of Court of Appeals, dated December 4, 1970 ..... A-9

Appendix C. Order of Court of Appeals, dated December 29, 1970, denying rehearing A-10

CITATIONS

Cases:

Adickes v. S. H. Kress and Company, 398 U. S. 144 44

Aguilar v. Texas, 378 U. S. 108 ..... 27, 34, 35, 36, 41

Anderson v. Haas, 3 Cir., 341 F. 2d 497 25

Banish v. Locks, 7 Cir., 414 F. 2d 638 38

Basista v. Weir, 3 Cir., 340 F. 2d 74 44

Beck v. Ohio, 379 U. S. 89 27

Chapman v. United States, 365 U. S. 610 42

Chimel v. California, 395 U. S. 752 42

Cohen v. Norris, 9 Cir. en banc, 300 F. 2d 24 37

Draper v. United States, 358 U. S. 307 ..... 25, 28, 44

Giordano v. Lee, 8 Cir., 434 F. 2d 1227 2

Jones v. United States, 357 U. S. 493 42
Joseph v. Rowlen, 7 Cir., 402 F. 2d 367 .....25, 44, 45
McCray v. Illinois, 386 U. S. 300 .....28, 36
Monroe v. Pape, 365 U. S. 167 .....24, 44
Nesmith v. Alford, 5 Cir., 318 F. 2d 110 (on petition for rehearing, 319 F. 2d 859), cert. den. 375 U. S. 975 .....24, 37, 43
Pierson v. Ray, 386 U. S. 547 .....37, 45
Pritchard v. Smith, 8 Cir., 289 F. 2d 153 25
Recznik v. City of Lorain, 393 U. S. 166 29
Spinelli v. United States, 393 U. S. 410 .....30, 33, 34, 35, 36, 41, 42, 44
Vale v. Louisiana, 399 U. S. 30 42
Whirl v. Kern, 5 Cir., 407 F. 2d 781, cert. den. 396 U. S. 901 .....24, 38, 43
White v. Swenson, D. C. Mo., 301 F. Supp. 447 30
Wong Sun v. United States, 371 U. S. 471 .....26, 43
York v. Story, 9 Cir., 324 F. 2d 450, cert. den. 376 U. S. 939 24

Constitutional Provisions:

Fourth Amendment 3, 7
Fifth Amendment 3, 8
Fourteenth Amendment 3, 8

Statutes:

28 U. S. C., Section 1343(3) 4, 7
42 U. S. C., Section 1983 ..3, 4, 6, 7, 22, 23, 24, 37, 44, 45

Rules:

Federal Rules of Civil Procedure
Rule 56(c) 4, 31
Rule 56(e) 5, 37

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To the United States Court of Appeals for the Eighth Circuit

Anthony Giordano and James Giammanco, your petitioners, respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled consolidated causes on December 4, 1970.

OPINIONS BELOW

These causes were decided by a panel of the United States Court of Appeals on December 4, 1970, in an opinion which is reported in **Giordano v. Lee**, 434 F. 2d 1227. The opinion is reproduced as Appendix A hereto. The judgment of the Court of Appeals, dated December 4, 1970, is reproduced as Appendix B hereto.

Orders were entered by the district judges overruling petitioners' motions for summary judgment (A. 2, 4, 6, 35-36),[1] petitioners' motions for directed verdicts (A. 3, 5, 7, 37), and petitioners' after-trial motions (A. 4, 5, 7), but no opinions were written or reported.

JURISDICTION

The judgment of the United States Court of Appeals was entered on December 4, 1970. See Appendix B. A timely petition for rehearing en banc or, in the alternative, for a rehearing, was denied on December 29, 1970. See Appendix C.

The jurisdiction of this Court is invoked under 28 U.S. C., § 1254(1).

QUESTIONS PRESENTED

I

Whether petitioners were entitled to summary judgments or directed verdicts on the issue of liability because, as a matter of law, their arrests by respondent

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[1] The certified transcript of the record prepared at petitioners' request by the Clerk of the United States Court of Appeals for the Eighth Circuit includes the Appendix filed in said Court pursuant to Rule 30 of the Federal Rules of Appellate Procedure. Reference in this petition to such Appendix shall be by use of the letter "A.", followed by the appropriate page number.

police officers were illegal and not based upon probable cause and therefore in violation of Title 42, United States Code, Section 1983.

II

Whether respondent police officers were entitled to rely upon good faith as a defense to petitioners' actions under 42 U.S.C., § 1983:

A.) Where the defense of good faith was not pleaded and there was no evidence tending to establish such defense, and

B.) Where the arrests were made without a warrant and without probable cause.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES OF COURT INVOLVED

Amendments to Constitution of the United States:

IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

V

. . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law; . . .

XIV

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

Statutes of the United States:

Title 28, United States Code:

§ 1343. **Civil rights and elective franchise**

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * * * * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

Title 42, United States Code:

§ 1983. **Civil action for deprivation of rights**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Rules of Court:

Federal Rules of Civil Procedure

Rule 56. **Summary Judgment**

* * * * * * *

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the

hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

* * * * * * *

(e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

* * * * * * *

STATEMENT

This petition arises from three cases tried separately before juries in the United States District Court for the Eastern District of Missouri—two before the Hon. Roy W. Harper and one before the Hon. James H. Meredith.

In each case, the jury returned a verdict in favor of the defendants. The cases were separately appealed, but were thereafter consolidated in the Court of Appeals for briefing and argument, and a single opinion was rendered by the Court of Appeals affirming the District Court judgments. The cases bore the following numbers below:

Style	District Judge	District Court No.	Court of Appeals[2] No.
Giordano v. Lee et al.	Judge Harper	68 C 69(1)	19,825
Giammanco v. McKeone et al.	Judge Harper	68 C 73(1)	19,826
Giammanco v. Lee et al.	Judge Meredith	68 C 74(2)	19,827

Each petitioner, the plaintiff in the District Court, had sought damages against respondents under the Civil Rights Act (42 U.S.C., Section 1983) based upon separate allegedly wrongful arrests by the defendant police officers. The pleadings and procedural history of each case were generally the same; only the facts of each arrest were different.

In each case petitioners sued police officers of the City of St. Louis for damages, actual and punitive. The suits were filed at the same time, and the complaints in each instance were almost identical, except insofar as pertinent dates of arrest were concerned.[3]

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[2] Where reference is made in this petition for certiorari to pleadings, facts or other proceedings in particular cases, we will generally refer to such cases by the number in the Court of Appeals—No. 19,825, No. 19,826, or No. 19,827.

[3] Actually ten different lawsuits were filed simultaneously by petitioners, involving twelve different arrests. The defendants in each case were different, although all were St. Louis police officers. In some instances, the same officer was a defendant in more than one suit, as, for example, Capt. Lee in Nos. 19,825 and 19,827.

Petitioner Giordano filed four suits based upon arrests on March 30, 1967, September 13, 1967, September 28, 1967, and

After alleging that the cause of action arose under the provisions of Title 42, United States Code, Section 1983, with jurisdiction vested in the Court under the provisions of Title 28, United States Code, Section 1343(3), the first amended complaint (A. 8-13) of each petitioner alleged that he was arrested by the defendant police officers, imprisoned, finger-printed, photographed, and released only after securing the services of an attorney and bondsman (In No. 19,827, the second amended complaint alleged two separate arrests of petitioner Giammanco by the same officers on different dates). The complaints generally alleged that the plaintiff had been lawfully and peacefully conducting himself when he was arrested, that there was no warrant or other lawful process for his arrest and imprisonment, that the officers knew or should have known that they had no basis for the arrest, and that no warrant or other lawful process was issued after the arrest charging the plaintiff with the commission of any offense. It was further alleged that the purpose of the arrest was to harass the plaintiff, and that it was done with malice and without probable cause or reasonable grounds to believe that the plaintiff had committed an offense. Alleging that the officers were acting under color of law in falsely arresting and imprisoning the plaintiff without a warrant or probable cause and in depriving him of his liberty without due process of law, the plaintiff claimed that he was subjected to the deprivation of his rights, privileges and immunities secured to him under the Fourth,

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January 31, 1968. Petitioner Giammanco filed six suits based upon arrests on April 19, 1967, May 9, 1967, July 11, 1967, September 13, 1967, November 30, 1967, January 20, 1968, January 26, 1968, and February 23, 1968.

The pleadings and pre-trial history of all ten cases were similar. Three cases were tried by juries, resulting in defendants' verdicts. Petitioners then dismissed the other seven cases without prejudice because the issues for appellate review had been crystallized in the three cases tried.

Fifth and Fourteenth Amendments to the Constitution of the United States. In each instance the plaintiff sought actual damages of $10,000.00 and punitive damages of $50,000.00, except that as to the second arrest in No. 19,827, petitioner Giammanco sought punitive damages of $500,000.00.

The answers filed by the defendants (A. 14) were basically similar in each case in that they admitted the citizenship of the plaintiff and the fact that the defendants were police officers, but denied generally all other allegations of the complaint.

Numerous sets of interrogatories were served by each side in each case. In many respects they were similar. They were directed towards background information of the parties and specific requests for information pertaining to the particular arrests involved in the individual cases (A. 15-17).

After the answers to interrogatories (A. 18-34) were filed, each plaintiff filed separate motions for summary judgment in each case (A. 34-35). The motions alleged that the defendants' answers to interrogatories showed as a matter of law that there was no probable cause for the arrests of the plaintiffs, and therefore there was no genuine issue as to any material fact pertaining to liability. The plaintiffs sought a summary judgment, interlocutory in character, on the issue of liability, with the question as to the amount of damages to be submitted to the jury. Each motion for summary judgment was overruled by the trial Court (A. 2, 4, 6, 35-36).

Thereafter, there was a separate jury trial in each case. No. 19,825 was tried before Judge Harper on March 17 and 18, 1969; No. 19,826 was tried before Judge Harper on March 18 and 19, 1969; No. 19,827 was tried before Judge Meredith on May 14 and 15, 1969.

At the close of all of the evidence, all parties moved for directed verdicts in their favor. In Nos. 19,825 and 19,826, the plaintiffs' motions (A. 36-37) were refused (A. 3, 5, 37); as to the defendants' motions, ruling was reserved (A. 3, 5). In No. 19,827, the Court reserved ruling on all the motions (A. 7, 37).

After similar closing arguments in each case, and almost identical charges to the jury, the result in each case was the same: there was a verdict in favor of the defendants (A. 3, 5, 7), although in No. 19,825 the Court directed a verdict for two defendants (Roth and Stetson) after sustaining their motions for directed verdict at the close of the plaintiff's evidence (A. 2).

Each plaintiff's motion for judgment in accordance with motion for directed verdict or motion for new trial was overruled (A. 4, 5, 7).

* * * * * * *

In No. 19,825, petitioner Anthony Giordano sued Capt. Harry J. Lee, Lt. Edwin Roth and Det. Roey Stetson for damages arising out of an arrest on March 30, 1967. The Court directed a verdict in favor of Lt. Roth and Det. Stetson (A. 2).

In No. 19,826, petitioner James Giammanco sued Capt. Charles McKeone and Lt. William Brown over an arrest on April 19, 1967.

In No. 19,827, petitioner James Giammanco sued Capt. Harry J. Lee and Sgt. John Weingart over two arrests on May 9, 1967, and February 23, 1968.

All of the respondents were asked by petitioners' Interrogatories 17 K 6 and 17 K 7 (and 52 K 6, 53 K 6, 53 K 7 and 54 K 7 in No. 19,827) (A. 16, 17) to state the details of the offense for which they arrested petitioner and the information possessed at the time of the arrest concerning

his participation therein. Their answers were relied upon by petitioners to support the motions for summary judgment.

The trial evidence as to each individual arrest was of course different, but there were many similarities during the trials. Petitioner Giordano was 54 years old and vice-president of Banana Distributing Company of St. Louis, a wholesaler of bananas. Petitioner Giammanco was 48 years old and a stock supervisor for Gus Mercurio. Each petitioner testified generally as to his arrest without a warrant by respondents and his detention in police custody for approximately four hours in each case. His release was obtained after contact with his attorney and bondsman. In each instance no prior warrant had been issued for the arrest of petitioner, and no formal charge was ever preferred against him. In defense the officers testified generally as to the information which they possessed leading up to the arrest, there being no dispute that respondents had made the arrests without arrest warrants and while acting as police officers.

Over the frequent objections of petitioners, there was considerable testimony on cross-examination of each petitioner concerning his background, associations, reputation, and prior arrests, and on direct examination of the officers as to hearsay and anonymous information received by them.

The crucial issue of probable cause is involved, for purposes of review by this Court, at two stages of the proceedings—on petitioners' motions for summary judgment and on their motions for directed verdict. The facts material to the summary judgment determination are those presented by respondents' answers to interrogatories, and those material to the directed verdict rulings are contained in the evidence presented at the trials. The relevant answers and evidence in each case are:

No. 19,825 (Giordano arrest of March 30, 1967)

Answer to Interrogatories:

Capt. Lee's answer 17 K 6 (A. 18-19) was:

"William Kuna was murdered on March 30, 1967, about 12:10 a.m. at 4123 Chippewa Street. Gambling has been going on in those premises for a period of at least 6 months prior to the murder. I had information that on December 20, 1966, one Raymond Reash, James Giammanco, Warren Dapron, Billy Dickens, and Ignatius DiCampo were arrested for gambling at 4123a Chippewa. I reasonably believed that the murder of Kuna was concerned with gambling activities at this location. I further believed that Giordano had knowledge of the gambling activities there or was responsible for its operation from the reputation of Giordano. I went to 2600 North Broadway to question subject about gambling activities and the murder. Upon my arrival and brief questioning, he became extremely nervous and grabbed at my arm at which time I placed him under arrest and caused him to be conveyed to headquarters for questioning relative to these matters. I understand other persons were arrested in connection with the murder and I believe they were Donald Lee Woods, Warren Dapron, James Giammanco, Joseph Rachid, Raymond Reash, and Oscar Pinson. Others were questioned concerning the murder and they were Carol Ufer, Oscar Hart, Roger Renner, Dale Hall, William Hartman, Karen Kuna, Martha Gunpert and others who I do not specifically recall. To date no murder charge has been issued;"

Lt. Roth's answer 17 K 6 (A. 20-21) was:

"I had knowledge that in the middle of December, 1966, the persons named in Answer 17 K-5 (Raymond Reash, James Giammanco, Warren Dapron, Billy

Dickens, Ignatius DiCampo) were gambling at 4123a Chippewa. I knew that this address had a reputation for gambling activities and that associates and friends of Giordano and in fact his nephew, James Giammanco, frequented this address. I further had knowledge that this address was raided in October 1966 for gambling. I believed that the murder of William Kuna, which occurred on March 30, 1967, at 4123 Chippewa, was connected with gambling activities. I believe that Giordano had some knowledge of the activities there. I, with Captain Lee, Roey Stetson, and Lyman Armstrong went to 2600 North Broadway. On brief questioning by Captain Lee, Giordano became extremely shaken and grabbed at Captain Lee's arm. He was then placed under arrest by Captain Lee and conveyed to police headquarters by Detectives Stetson and Armstrong. Others were arrested in connection with the murder, the dates I do not know. They were Donald Woods, Warren Dapron, James Giammanco, Joseph Rachid, Raymond Reash and Oscar Pinson. Others were questioned and the ones that I remember were Karen Kuna and some other females who were allegedly at the premises at the time of the murder."

Det. Stetson's answer 17 K 7 (A. 23) was:

"On the same day of the arrest, Sgt. Armstrong requested me to go with him and gave me no further details. While in police car, Armstrong told me we were going to look for Giordano. When we arrived at 2600 N. Broadway, I was instructed by Sgt. Armstrong to go to the rear outside of the premises of the Banana Distributing Company. About 5 minutes thereafter, Sgt. Armstrong, Capt. Lee and Lt. Roth came to rear of building and Sgt. Armstrong waved me to come to them. I did so and Sgt. Armstrong and I then conveyed Giordano to Headquarters."

Evidence at trial:

Capt. Lee testified that he arrested Mr. Giordano on March 30, 1967, for gambling which took place from December 20, 1966, to March 30, 1967 (A. 59). His information as to the gambling came from police reports of arrests of persons other than petitioner in December 1966 at Kincannon's Bar (A. 44). It was also based upon four alleged informants.

Informant No. 1 was unidentified. He previously had given the Captain information as to a holdup which actually took place and had given him other information, the details of which he did not recall (A. 45-46). He had been furnishing other information for five or six months which had not resulted in any arrests. The informant had been arrested at least twice previously and convicted once (A. 55). On March 10, 1967, he told Capt. Lee that there was gambling upstairs over Kincannon's Bar and that he had seen Mr. Giordano going upstairs. He gave no specific details or dates of the gambling and did not see Mr. Giordano do anything other than going upstairs (A. 46-47, 56).

Informant No. 2, also unidentified, had not given Capt. Lee any prior information but had given information to Lt. Roth. About the first of March, 1967, he told Lt. Roth and Capt. Lee that there was gambling upstairs over Kincannon's and that he had seen Mr. Giordano's nephew going upstairs and had seen Mr. Giordano with him (A. 47-48). Prior to March 1, 1967, he had seen Mr. Giordano on the premises of the tavern and going upstairs. None of the police officers who had kept the establishment under surveillance had ever reported seeing Mr. Giordano there (A. 56-57).

Informant No. 3 was Warpy Smith, who died in 1966. The only information he gave was about a gambling operation

in 1955 (A. 48-49), and in 1959 he stated that Mr. Giordano was becoming involved in gambling in St. Louis (A. 49-51).

Informant No. 4 was an unidentified operator of a coffee house who gave him information in 1965 about Mr. Giordano's alleged gambling activities, the information being based on certain statements allegedly made by Mr. Giordano's nephew (A. 51, 58).

No. 19,826 (Giammanco arrest of April 19, 1967) .

Answer to Interrogatories

Capt. McKeone's answer 17 K 7 (A. 25-26) was:

> "I received 2 anonymous telephone calls about the 18th or 19th of March, 1967. The calls were to the effect that gambling was being conducted on the premises by Giammanco and Licavoli. Lt. Brown informed me about 4 days prior to the arrest that Giammanco and Licavoli were conducting gambling activities from an anonymous phone call received about the same time. I was aware that Licavoli was arrested on or about January 12, 1967 and he had gambling paraphernalia in his possession on the premises. I personally watched this premises for three weeks prior to the arrest by driving by and observing whose automobiles were present. On these visits to the premises during these three weeks I saw Giammanco on 2 occasions come out of the door and look around suspiciously and on another occasion he came out and wiped off his automobile. On another occasion he drove past me and slowed down and looked towards me. At that time I was in an unmarked police automobile parked about one-half block away on 11th Street. I have knowledge that there have been arrests made there for gambling and

the premises had a reputation for gambling. I also have seen both Licavoli and Giammanco in the company of persons who have a reputation for gambling and that both subjects have a record for gambling and that Giammanco is a convicted felon. I also had knowledge from my years on the police force that Giammanco's reputation is very bad. I further had information from an agent of the Federal Bureau of Investigation, whose name I will not reveal, that Giammanco was gambling at Kincannon's Lounge the evening of the murder of William Kuna. All of these facts reasonably led me to believe that James Giammanco was at the time and place of arrest, engaged in gambling."

Lt. Brown's answer 17 K 7 (A. 27) was:

"I received anonymous telephone approximately 4 days before the arrest to the effect that Licavoli and Giammanco were running a game at this location. Captain McKeone told me that he had received two anonymous calls about the middle of March that Licavoli and Giammanco were taking bets on 10th Street. I was also aware that Giammanco was a known gambler and that Licavoli was arrested on January 12, 1967, and gambling paraphernalia used in taking horse bets was found in his possession while he was on these same premises. The premises were under surveillance for approximately three weeks and I personally rode by during this period, the number of times unknown, but at least 3 or 4 times. On the date of arrest Licavoli's auto was in the rear and James Giammanco's auto was parked in the front of the premises. Knowing each of their reputations for gambling, I reasonably believed them to be engaged in gambling activities at the time of their arrest. I was also informed by Lt. McKeone that Giammanco was gambling at Kincannon's Lounge the night of the murder of William Kuna."

Evidence at trial

Capt. McKeone and Lt. Brown arrested Mr. Giammanco and Mr. Licavoli at an American Legion Club on April 19, 1967, for operating a handbook and card playing on that date (A. 71, 84). The officers found no evidence of any handbook operation or any card game being played. They had not talked with anyone who had placed a bet with Mr. Giammanco or who had seen him playing cards on the date of the arrest (A. 71-72, 84).

With reference to the basis for the arrest, the officers testified that when they were assigned to the Vice Division on February 1, 1967, they reviewed files concerning gambling and received information from the Intelligence Unit that there was gambling at the Legion Club (A. 60, 75). They had also read reports concerning gambling arrests and other activities at Kincannon's Bar, 4123 Chippewa, with Mr. Giammanco being arrested by other officers on October 27, 1966, and December 20, 1966 (A. 65-66, 75-76). The reports stated that the October arrest at Kincannon's second floor was based upon information received by the police that gambling was being conducted, but there was no game in progress when the arrest was made (A. 66-68). No warrant was issued against Mr. Giammanco or the others arrested, and he was not brought to trial (A. 73).

The report of the December arrest indicated that Mr. Giammanco and others had again been arrested after the officers forced their way into the second floor room (A. 68-70). Again, no warrant was issued or applied for against Mr. Giammanco, and he was not tried (A. 74).

Lt. Brown visited Kincannon's as a patron four or five times before Kuna was killed, March 30, 1967. He saw Mr. Giammanco there at least twice, walking around the

tavern (A. 76), but not doing anything illegal (A. 81). Capt. McKeone had also been to Kincannon's about March 1, 1967, but he did not see Mr. Giammanco (A. 70).

The officers were aware from police reports that Mr. Licavoli had been arrested on January 12, 1967, at the Legion Post as a custodian of a bet. They had been told that other officers had received complaints of gambling at the Club. When Mr. Licavoli was arrested there were bet tabs in his pocket (A. 64-65). A warrant was applied for but refused, and he was never brought to trial (A. 73). The officers knew of no other arrests at the Legion Post (A. 65).

About March 17th, Capt. McKeone received a phone call from an anonymous person that gambling was going on at the Club (A. 61). Between that date and April 19th, the officers made a number of surveillances at the Legion Club approximately three to four times a week. They saw Mr. Giammanco and Mr. Licavoli at least three or four times; their cars were parked in the vicinity. During that time Mr. Giammanco would come out of the building and look around, stand on the sidewalk, drive past the officers, and wipe off his car and look around. He made no attempt to conceal his presence, and he did nothing illegal on any of these occasions (A. 61-63, 74, 77-78, 82).

Based upon the prior reports as to Kincannon's, Mr. Giammanco's activities, and other information supplied by informants, Lt. Brown suspected that he was engaged in illegal activities (A. 82-83). He also knew that Mr. Giammanco was a convicted felon and had been arrested at least 15 to 20 times for gambling, but he did not know of any convictions (A. 78).

No. 19,827 (Giammanco arrest of May 9, 1967).

Answer to Interrogatories:

Capt. Lee's and Sgt. Weingart's answers 17 K 6 (A. 29, 32) as to the details of the offense were:

"Subject used a revolver to hold-up victim."

Capt. Lee's answer 17 K 7 (A. 29) as to his information concerning Mr. Giammanco's participation in the offense was:

"Telephone call from an informant."

Sgt. Weingart's answer 17 K 7 (A. 32) was:

"Telephone call from informant that subject had robbed A & P Market."

Evidence at Trial:

Capt. Lee and Sgt. Weingart arrested Mr. Giammanco on May 9, 1967, on the parking lot near the Legion Post. The offense was robbery of an A & P Market (A. 85-86, 103). The arrest was based upon information received by Sgt. Weingart from an unidentified informant. He had never met this informant previously, did not know his name, and would not know how to contact him for use as a witness. He could have been a thief or a bank president (A. 94-95).

The informant usually called for Sgt. Roth but had given prior information to Sgt. Weingart (A. 87). The first occasion was with reference to a theft of some movie equipment which was recovered, and an arrest was made based upon the information received (A. 89). On the second occasion, the information led to the recovery of a bundle of postal money orders, but no arrests were made (A. 90). On the day of the arrest, the informant called and told the Sergeant to get Jimmy Giammanco if they

wanted the man who held up the A & P Store. He said he had seen him run from the place and get in an old beat-up car, but he had just learned his name (A. 90).

At the time of the arrest, Mr. Giammanco was 46 years old, was 5 feet 9 inches tall, weighed 200 pounds, and had black or brown hair (A. 85). Sgt. Weingart knew him for 25 years. He checked the description in the police report pertaining to the holdup, and the suspect was a person weighing 170 pounds, 24 years old, six feet tall, brown hair, dark complexion, medium build (A. 95-96, 102). Capt. Lee also knew the description in the police report and knew Mr. Giammanco (A. 111).

Before the arrest no pictures were shown of Mr. Giammanco to the victim. The officers testified that there was a written department policy against showing pictures to victims (A. 99-100, 112-113), although they had a picture of Mr. Giammanco in the file (A. 112). They showed pictures only when they do not have the suspect's name, but where they have the name they do not show pictures but instead make the arrest (A. 106-107).

After Sgt. Weingart got the information over the telephone, he discussed the matter with Capt. Lee and they decided to arrest Mr. Giammanco (A. 103-106). The Captain never talked to the informant (A. 112).

No. 19,827 (Giammanco arrest of February 23, 1968)

Answer to Interrogatories:

Capt. Lee's answer 54 K 7 (A. 30-31) was:

> "On the morning of February 23, 1968, at about 11 a.m. I received a phone call from a female, who refused to identify herself, and she commented on a gambling raid which occurred the day before and stated that at 12:30 p.m. each week day a white male

uses the telephone in the barber shop on Ninth Street, north of Delmar to phone in betting information. She also stated she knew who the bookmaker was but refused to identify him. From the tone of her voice, she sounded to me that she was personally and emotionally involved with the betting operation. I asked her what her connection was and she said 'if you don't want to do anything about it, forget it' and hung up. I waited until about 12:15 p.m. and Sgt. Weingart and I went to the barber shop, parked the car and went to the window and saw a white male on the phone with his back to us. We walked in and approached the person and he turned towards us with the phone to his ear. At that time I recognized the subject as James Giammanco. He had a small piece of paper in his left hand and he concealed it by putting it in his pocket. I told him he was under arrest for gambling, advised him of his rights, and he was brought to the station. Based upon his reputation as a known gambler and my experience as a former member of the gambling squad, I reasonably believed that he was telephoning bets;"

Sgt. Weingart's answer 53 K 7 (A. 33-34), was identical to Capt. Lee's except that he did not receive a phone call but referred to the call allegedly received by the Captain.

Evidence at trial:

Capt. Lee and Sgt. Weingart also arrested Mr. Giammanco on February 23, 1968, in a barber shop on Ninth and Delmar. The arrest was for gambling (A. 91-92, 110), and took place the day after the officers became aware that they had been sued by Mr. Giammanco over the arrest on May 9, 1967 (A. 101, 115). The Captain said the arrest was based upon a phone call which he had received from an anonymous woman who told him to go to Ninth

and Delmar at 12:30 to get the man who was calling bets in (A. 109). He did not know who the woman was and did not know whether she was reliable (A. 116). She did not tell him who the man on the phone would be (A. 120). After he received the anonymous call, Capt. Lee and Sgt. Weingart, who were not assigned to the gambling squad, went out to make the arrest (A. 109-110).

Capt. Lee knew that Mr. Giammanco had a background of gambling and had been arrested in a gambling raid in October 1966, and December 1966 (A. 107). He said that the barber shop had a reputation of being a place frequented by gamblers (A. 108). He did not know of any arrests that had taken place at the barber shop (A. 117). His suspicion was based upon the reputations of Mr. Giammanco and the people who frequented the place, although none had ever been arrested and convicted of a gambling offense (A. 117-118). He made the arrest on the basis of the anonymous phone call, his knowledge of gambling operations at the barber shop, and the fact that Mr. Giammanco at the time of arrest had a piece of paper with two numbers on it (A. 116, 118).

* * * * * * *

As previously indicated, petitioners' motions for summary judgment, based upon the insufficiency of the answers to interrogatories to show probable cause, were overruled (A. 2, 4, 6, 35-36). Petitioners' motions for directed verdicts during the trials, based upon the insufficiency of the evidence to show probable cause, were not granted (A. 3, 5, 7, 37). Petitioners' after-trial motions were overruled (A. 4, 5, 7), and each petitioner then filed separate notices of appeal to the United States Court of Appeals for the Eighth Circuit (A. 39-42).

The three cases were consolidated in the Court of Appeals. They were briefed and argued together, and on December 4, 1970, the Court of Appeals affirmed the judg-

ments of the District Court in an opinion reported at 434 F. 2d 1227 and written by Chief Judge Matthes and concurred in by Circuit Judge Heaney and Senior District Judge Van Pelt. See Appendix A. Petitioners' petition for rehearing was denied on December 29, 1970. See Appendix C.

This petition for a writ of certiorari seeks to review the judgment of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

Petitioners believe that there are numerous reasons for review on writ of certiorari of the decision of the Court of Appeals:

1. The decision of the Court of Appeals is in conflict with decisions of other Courts of Appeals.

2. The decision of the Court of Appeals decides important questions of federal law which have not been, but should be, settled by this Court.

3. The decision of the Court of Appeals decides federal questions in ways in conflict with applicable decisions of this Court.

4. The decision of the Court of Appeals departs from the accepted and usual course of judicial proceedings, and guidelines thereon should be established by this Court for the benefit of the Courts of Appeals.

Because of the multitude of cases which are being brought under the provisions of 42 U.S.C., § 1983, we believe that it would be appropriate for this Court to clarify the important issues involved not only in the instant cases but in most § 1983 cases, so that District Courts and Courts of Appeals may avoid hopeless conflict.

In the order in which the questions have heretofore been presented, they will now be discussed in this argument so

as to amplify the reasons why petitioners believe it is important for this Court to review the decision of the Court of Appeals on each of these questions. (For the convenience of this Court, petitioners will restate each question presented prior to the argument.)

I

Whether petitioners were entitled to summary judgments or directed verdicts on the issue of liability because, as a matter of law, their arrests by respondent police officers were illegal and not based upon probable cause and therefore in violation of Title 42, United States Code, Section 1983.

Petitioners believe that these cases must be reversed and that they are entitled to new trials on the issue of damages only, for the reason that in each case petitioner was entitled to a summary judgment or a directed verdict. The record shows conclusively that there was no probable cause for any arrest and that the arrests were illegal. Hence, each petitioner was entitled to recover as a matter of law on his claim under Section 1 of the Civil Rights Act of 1871, Title 42, United States Code, Section 1983, which is entitled "Civil action for deprivation of rights" and provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Section 1983 authorizes a civil action for deprivation of constitutional rights by an officer acting under color

of law. The propriety of such an action has been recognized by this Court in **Monroe v. Pape**, 365 U. S. 167; **Pierson v. Ray**, 386 U.S. 547, and more recently in **Adickes v. S. H. Kress and Company**, 398 U. S. 144, where it is said (l. c. 150):

> "The terms of § 1983 make plain two elements that are necessary for recovery. First, the plaintiff must prove that the defendant has deprived him of a right secured by the 'Constitution and laws' of the United States. Second, the plaintiff must show that the defendant deprived him of this constitutional right 'under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory.' This second element requires that the plaintiff show that the defendant acted 'under color of law.' "

See also **Cohen v. Norris**, 9 Cir. en banc, 300 F. 2d 24; **York v. Story**, 9 Cir., 324 F. 2d 450, cert. den. 376 U. S. 939; **Basista v. Weir**, 3 Cir., 340 F. 2d 74; **Nesmith v. Alford**, 5 Cir., 318 F. 2d 110 (on petition for rehearing, 319 F. 2d 859), cert. den. 375 U. S. 975, and **Whirl v. Kern**, 5 Cir., 407 F. 2d 781, cert. den. 396 U. S. 901.

There was no dispute in the instant cases that the officers were acting under color of law. Answer 6 B of each respondent to petitioners' Interrogatories stated that he was a police officer at the time of the arrest (A. 18, 20, 22, 24, 26, 28, 31). Answer 16 (and Answers 52 and 53 in No. 19,827), acknowledged that he arrested or participated in the arrest of plaintiff (A. 18, 20, 22, 25, 26, 28, 29, 31, 32).

As to the other element of the cause of action under § 1983, that the officer subjected the petitioner to a deprivation of his constitutional rights, the Answers to Interrogatories and the evidence leave no doubt that petitioners were illegally arrested without warrants and without probable cause.

In **Joseph v. Rowlen**, 7 Cir., 402 F. 2d 367, the Seventh Circuit stated (l. c. 370):

> "We conclude that under 42 U. S. C., sec. 1983, where a police officer makes an arrest which is unlawful under the federal constitution because made without a warrant and without probable cause to believe that the person arrested had committed or was committing an offense, sec. 1983 imposes on the officer a liability which is recoverable in federal court. Additional circumstances coloring the officer's action as flagrant or malevolent are not required."

* * * * * * * *

Before discussing the Answers to Interrogatories and the evidence, we believe it would be appropriate to set forth some general principles of law on arrest and probable cause, so that these principles may be applied to the facts of this case in developing our contention that there was no probable cause for the arrests. Because this is an action under a federal statute based on violation of rights guaranteed by the United States Constitution, federal law governs. **Pritchard v. Smith**, 8 Cir., 289 F. 2d 153, 154; **Anderson v. Haas**, 3 Cir., 341 F. 2d 497, 499.

"Probable cause" of Fourth Amendment origin has been the subject of much legal debate. It most often arises in search questions, generally in the determination of whether an officer had probable cause to make an arrest without a warrant and a search incident to such arrest, or whether probable cause existed for the issuance of a search warrant. Cases deciding both types of problems are therefore germane to the issue presented for review here.

In **Draper v. United States**, 358 U. S. 307, this Court found probable cause for an arrest without a warrant where information was received from someone whose accuracy and previous reliability had been clearly estab-

lished and who gave specific details concerning the alleged offense. The Court stated (l.c. 313):

> "Probable cause exists where 'the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. **Carroll v. United States,** 267 U. S. 132, 162."

In **Wong Sun v. United States,** 371 U. S. 471, this Court stated in finding no probable cause for an arrest without warrant (l.c. 479):

> ". . . It is basic that an arrest with or without a warrant must stand upon firmer ground than mere suspicion, see **Henry v. United States,** 361 U. S. 98, 101, though the arresting officer need not have in hand evidence which would suffice to convict. The quantum of information which constitutes probable cause—evidence which would 'warrant a man of reasonable caution in the belief' that a felony has been committed, **Carroll v. United States,** 267 U. S. 132, 162—must be measured by the facts of the particular case. The history of the use, and not infrequent abuse, of the power to arrest cautions that a relaxation of the fundamental requirements of probable cause would 'leave law abiding citizens at the mercy of the officers' whim or caprice.' **Brinegar v. United States,** 338 U. S. 160, 176.
>
> "Whether or not the requirements of reliability and particularity of the information on which an officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent than where an arrest warrant is obtained. Otherwise a principal incentive now existing for the procurement of arrest warrants would be destroyed."

In **Aguilar v. Texas**, 378 U. S. 108, this Court considered probable cause in connection with the issuance of a search warrant. The affidavit merely stated that the affiants had reliable information from a credible person that narcotics were being kept on the premises to be searched. The Court held that this was insufficient because there was no proof of the underlying circumstances to corroborate the informant's information and nothing to show that the informant was credible or his information reliable.

In **Beck v. Ohio**, 379 U. S. 89, this Court stated (l. c. 91):

> ". . . The constitutional validity of the search in this case, then, must depend upon the constitutional validity of the petitioner's arrest. Whether that arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense. **Brinegar v. United States**, 338 U. S. 160, 175-176; **Henry v. United States**, 361 U. S. 98, 102. 'The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating . . . often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice.' **Brinegar v. United States**, supra, at 176."

The Court in the **Beck** case then reviewed the evidence submitted in connection with the officers' knowledge at the time of the arrest. It showed that the officer had a police picture of the defendant, knew he had a record of gambling and that the officers had some information and

had heard reports. The Court pointed out that there was nothing to indicate that the officers had seen, heard, smelled or otherwise perceived anything to give them ground for belief that the petitioner had acted or was then acting unlawfully. After discussing the **Draper** case, this Court stated (l. c. 95-96):

> ". . . In complete contrast, the record in this case does not contain a single objective fact to support a belief by the officers that the petitioner was engaged in criminal activity at the time they arrested him.
>
> "An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment. 'Whether or not the requirements of reliability and particularity of the information on which an officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent than where an arrest warrant is obtained. Otherwise, a principal incentive now existing for the procurement of arrest warrants would be destroyed.' **Wong Sun v. United States**, 371 U. S. 471, 479-480."

In **McCray v. Illinois**, 386 U. S. 300, there was an arrest without a warrant based upon information received by officers from an informant whose previous reliability was amply demonstrated in the record and who specifically said that the defendant was selling narcotics and had the narcotics on his person and could be found at a particular place at a certain time. This Court found probable cause to sustain the arrest under the **Draper** case, and said (l.c. 304-305):

> ". . . Unlike the situation in **Beck v. Ohio**, 379 U. S. 89, each of the officers in this case described with

specificity 'what the informer actually said, and why the officer thought the information was credible.' 379 U. S., at 97. The testimony of each of the officers informed the court of the 'underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant . . . was "credible" or his information "reliable."' **Aguilar v. Texas**, 378 U. S. 108, 114. See **United States v. Ventresca**, 380 U. S. 102. Upon the basis of those circumstances, along with the officers' personal observations of the petitioner, the court was fully justified in holding that at the time the officers made the arrest 'the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense. **Brinegar v. United States**, 338 U. S. 160, 175-176; **Henry v. United States**, 361 U. S. 98, 102.' **Beck v. Ohio**, supra, at 91."

In **Recznik v. City of Lorain**, 393 U. S. 166, this Court found that there was no probable cause in an arrest involving gambling. After reviewing the evidence, the per curiam opinion stated (l.c. 169-170):

"We have held that the prosecution has not met its burden when an arresting officer 'said no more than that someone (he did not say who) had told him something (he did not say what) about the petitioner.' **Beck v. Ohio**, 379 U.S. 89, 97. Even where a search warrant is obtained, the police must show a basis for the search beyond the mere fact of an assertion by an informer. **Aguilar v. Texas**, 378 U. S. 108. At least as much is required to support a search without a warrant. **Beck v. Ohio**, supra, at 96. Since the

> respondent did not meet the burden of showing probable cause in this case, the motion to suppress should have been granted."

The circumstances surrounding the arrest were set forth in greater detail in the dissenting opinion.

Finally, in **Spinelli v. United States**, 393 U. S. 410, this Court reviewed the doctrine of probable cause and found, with substantially more evidence that was present in any of the instant cases, that there was no probable cause. In footnote 5, the Court stated (l.c. 417):

> "While **Draper** involved the question whether the police had probable cause for an arrest without a warrant, the analysis required for an answer to this question is basically similar to that demanded of a magistrate when he considers whether a search warrant should issue."

And in determining the existence of probable cause, the **Spinelli** opinion makes clear that the arrested person's reputation is of no consequence, for the Court stated (l.c. 414):

> ". . . Finally, the allegation that Spinelli was 'known' to the affiant and to other federal and local law enforcement officers as a gambler and an associate of gamblers is but a bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the magistrate's decision. **Nathanson v. United States**, 290 U. S. 41, 46 (1933)."

Based upon the foregoing authorities,[4] we believe that the facts detailed in the Answers to Interrogatories and in the testimony of the police officers in the instant cases

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[4] For an interesting case discussing all of these decisions in their application to a Missouri arrest and search matter, see **White v. Swenson**, D. C. Mo., 301 F. Supp. 447.

could not support a finding of probable cause for the arrests. Thus, petitioners were entitled to summary judgments and directed verdicts.

Summary judgment

After substantial numbers of Interrogatories had been submitted by both sides in each case, petitioners each filed motions for summary judgment (A. 34-35) seeking an interlocutory judgment against each respondent on the issue of liability, the amount of damages to be determined by the jury. Petitioners contended that there was no genuine issue of any material fact and that they were entitled to judgments as a matter of law. In Nos. 19,825 and 19,826, Judge Harper overruled the motions without opinion (A. 35). In No. 19,827, Judge Meredith ruled that summary judgment was not appropriate because "a consideration of the motion, the brief filed in support thereof, and the pleadings in this cause reveal that there exist genuine issues as to material facts"[5] (A. 36). We believe the trial Courts erred in such rulings.

A motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure is appropriate where either party as a matter of law is entitled to judgment in his favor. It need not go to all of the issues in the case, for, as provided in Rule 56 (c):

> "A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages."

This is the relief which each petitioner sought—a judgment in his favor on the issue of liability with the question of the amount of damages to be determined by a jury.

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[5] The "genuine issues as to material facts" were not spelled out.

The motions for summary judgment were based primarily upon respondents' Answers to Interrogatories. By their answers, the arresting officers, in effect, admitted that there was no probable cause, because in answer to Interrogatory 17 CC (and Answers 53 CC and 54 CC in No. 19,827) (A. 20, 22, 24, 26, 28, 29, 31, 32, 34), they each stated that the reason they did not apply for a warrant after the arrest was that there was insufficient evidence.

In each of these cases the officers were asked by petitioners' Interrogatories 17 K 6 and 17 K 7 (and 53 K 6, 53 K 7, 54 K 6, and 54 K 7 in No. 19,827) (A. 16, 17) to state the details of the offense for which they arrested each petitioner and the information possessed at the time of the arrest concerning his participation therein. Thus, a request was made for a statement of the facts on which the officers felt they had probable cause to make the arrest without a warrant. Their answers, when tested by the foregoing cases, showed as a matter of law that there was no probable cause.

In **No. 19,825**, the Giordano arrest of March 30, 1967, Capt. Lee's answer 17 K 6 (A. 18-19), and Lt. Roth's answer 17 K 6 (A. 20-21), both quoted verbatim in the Statement section of this Petition, were that Kuna had been murdered earlier in the day of the arrest of Mr. Giordano and that gambling had been going on at the premises where he was murdered for six months. The premises had a reputation for gambling activities and were frequented by associates and friends of Mr. Giordano. On December 20, 1966, several people (not including Mr. Giordano) were arrested there for gambling and there was a gambling raid in October, 1966. The officers believed that the Kuna killing was related to the gambling, and Capt. Lee believed that Mr. Giordano knew about or was responsible for the gambling "from the

reputation of" Mr. Giordano. They went to 2600 North Broadway to question Mr. Giordano about gambling and the murder, but he became extremely nervous and shaken and grabbed the Captain's arm. He was arrested and taken to headquarters for questioning. The answers concluded that other named persons were arrested or questioned in connection with the murder, presumably after the arrest of Mr. Giordano, but no murder charge has been issued.

There was nothing in these answers to show any probable cause for the arrest of Mr. Giordano because there was nothing to indicate that either officer had any information which would cause them to believe upon probable cause that petitioner was engaged in gambling or involved in the murder or had committed any offense for which he was arrested. As indicated in the **Spinelli** case, petitioner's associations and reputation are "entitled to no weight" in determining whether probable cause existed. The arrests and questioning of others, presumably after petitioner's arrest, added no basis without some further detail as to petitioner's criminal involvement. Contrary to the opinion of the Court of Appeals (434 F. 2d 1227, at 1231), where it is suggested that "a disputed issue was presented as to whether appellant Giordano's alleged hysterical behavior precipitated his arrest," the nervousness and alleged grabbing at the Captain's arm by petitioner, evidence of which was later injected at the trial in an apparent attempt to give some other basis to the arrest (A. 43, 51-52), was not a reason for the arrest, for in Answer to Interrogatory 17 K 1 (A. 18), Capt. Lee stated that the specific offense for which petitioner was arrested was "Gambling at 4123a Chippewa and questioning about murder of William Kuna." There was no claim in the answers to interrogatories that the arrest was based upon any hysterical behavior. The answers of these

respondents were completely devoid of any information which would constitute probable cause.

Det. Stetson's answer 17 K 7 (A. 23) was that he had been instructed to participate in the arrest by Sgt. Armstrong, and he had no knowledge as to any basis for the arrest. Obviously, he had no probable cause.

In **No. 19,826**, the Giammanco arrest of April 19, 1967, Capt. McKeone's answer 17 K 7 (A. 25-26) and Lt. Brown's answer 17 K 7 (A. 27) were that they had received anonymous telephone calls within a month before the arrest that Mr. Giammanco and Mr. Licavoli were conducting gambling at the American Legion hall, which had been the scene of prior arrests, including Mr. Licavoli. The premises had a reputation for gambling. Both men had reputations as gamblers and associates of gamblers, and Mr. Giammanco has been convicted of a felony and had a bad reputation. They also had information from an FBI agent that Mr. Giammanco was gambling at Kincannon's Lounge the night of the Kuna murder. On several occasions prior to the arrest, the officers had seen petitioner come out of the premises, look around, wipe off his automobile, or drive by slowly. Mr. Giammanco's auto was parked in front of the building on the date of the arrest.

These answers that the officers received information from anonymous telephone callers that gambling was being conducted by petitioner and another person could not constitute probable cause because there was nothing to corroborate the reliability of the anonymous callers. This information falls far short of the requirements of **Aguilar** and **Spinelli**. An arrest three months earlier of Mr. Licavoli (note that there was no mention of a formal charge and conviction) would not create probable cause as to Mr. Giammanco. Certainly, petitioner's leaving the premises on two occasions and wiping off his automobile

on another occasion or having his car parked in front of the premises would not create probable cause as to a gambling offense. Nor would the fact that he looked at the officer. The reputations of petitioner and others, as in **Spinelli**, are entitled to "no weight". The alleged information from the FBI Agent concerning petitioner's gambling on the evening of the Kuna murder shed no light on any gambling activity by petitioner on April 19, 1967, which was the date of the alleged offense for which petitioner was arrested.

In **No. 19,827**, as to the first arrest of Mr. Giammanco by Capt. Lee and Sgt. Weingart on May 9, 1967, Capt. Lee's and Sgt. Weingart's answers 17 K 6 (A. 29, 32) as to the details of the offense were: "Subject used a revolver to hold-up victim." Capt. Lee's answer 17 K 7 (A. 29) as to his information concerning Mr. Giammanco's participation in the offense was: "Telephone call from an informant." Sgt. Weingart's answer 17 K 7 (A. 32) was: "Telephone call from informant that subject had robbed A & P Market."

These answers were not sufficient to show probable cause for the arrest, because there was no proof, as required by **Aguilar** and **Spinelli**, to corroborate the informant's information and nothing to show that the informant was credible or his information reliable.

In **No. 19,827**, as to the second arrest of Mr. Giammanco by Capt. Lee and Sgt. Weingart on February 23, 1968, Capt. Lee's answer 54 K 7 (A. 30-31) and Sgt. Weingart's answer 53 K 7 (A. 33-34) were that the Captain had received a phone call on the morning of the arrest from a woman who refused to identify herself. She stated that a white man phoned betting information every day from a telephone in a barber shop at Ninth and Delmar, and that she knew but refused to identify the bookmaker. She sounded personally and emotionally involved in the

operation, but refused to explain her connection. When the two officers arrived at the barber shop, they saw a white man on the phone. When they walked in, the man turned and they recognized Mr. Giammanco, who had a reputation as a gambler. He put a small piece of paper in his pocket. They then arrested him.

It is clear from these answers that the only basis for the arrest was the anonymous phone call and the reputation of Mr. Giammanco. Such a phone call could not provide probable cause. The anonymity of the caller belies reliability without further indication as to justification for relying on the word of the caller. (Cf. **McCray**.) There was no corroboration, as required by **Aguilar** and **Spinelli**. The reputation of Mr. Giammanco was "entitled to no weight," as said in **Spinelli**. The fact that petitioner was making a telephone call in the barber shop on February 23, 1968 is not evidence of gambling. There was nothing illegal in using a telephone at a barber shop. (Cf. **Spinelli**.) Petitioner had a right to be where he was and to do what he was doing.

We believe the Court of Appeals was in error in stating (p. 1231 of 434 F.2d) that as to petitioner Giammanco's three arrests in Nos. 19,826 and 19,827, "the answers to his interrogatories did not conclusively demonstrate the unreliability of police informants or disclose in detail all the circumstances surrounding his arrests." The uncorroborated hearsay of unidentified and anonymous informants whose reliability was not shown is, as a matter of law, insufficient to provide probable cause. The failure to disclose in detail all the circumstances of the arrests was a fault of respondents. They had ample opportunity to do so in the answers to interrogatories or by affidavit; by not assuming their burden, they were properly subject to a summary judgment. Petitioner left no unexplained gaps and the truth was certain—he was entitled to a summary judgment.

* * * * * * *

Rule 56(c) of the Federal Rules of Civil Procedure provides:

> ". . . The (summary) judgment sought shall be rendered forthwith if the pleadings, depositions, **answers to interrogatories**, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . ." (Emphasis supplied to words added by 1963 amendment.)

The answers of respondents to the interrogatories showed conclusively that, as a matter of law, each respondent had no probable cause to arrest petitioner. Thus, there was no genuine issue as to any material fact, except as to the amount of damages to which petitioners were entitled. Respondents filed no affidavits or other documents after the filing of the motions for summary judgment to show that any such issue existed. They could not, under Rule 56(e), "rest upon the mere allegations or denials of (their) pleading."

Based upon the law with reference to the elements of a cause of action under 42 U.S.C., Section 1983, and based upon the law with reference to what constitutes probable cause, and based upon the answers of respondents to the interrogatories, petitioners were entitled to summary judgments. The lower Courts erred in ruling otherwise.

Directed verdict for plaintiff

Probable cause is recognized as an available defense to an action brought under 42 U.S.C., Section 1983. **Pierson v. Ray**, 386 U.S. 547. As a defensive matter, the burden of proof was on respondents. Cf. **Cohen v. Norris**, 9 Cir., 300 F. 2d 24, 32. Where the proof shows as a matter of law that there has been a Civil Rights Act violation, the plaintiffs are entitled to a directed verdict. **Nesmith v.**

Alford, 5 Cir., 318 F. 2d 110, 124-125, cert. den. 375 U.S. 975; **Whirl v. Kern**, 5 Cir., 407 F. 2d 781, 793, cert. den. 396 U.S. 901.

In each of these cases, petitioners filed a motion for directed verdict at the close of all of the evidence (A. 36-37). We believe these motions should have been sustained because petitioners established all of the elements of the cause of action as a matter of law. In each case there was no dispute and the evidence was uncontradicted that the petitioner had been arrested by the respondent police officers who were acting under color of law. Nor was there any dispute that all arrests were without the authority of a warrant. The only dispute was as to the existence of probable cause, and we submit that the evidence failed to reveal any probable cause for any arrest. The issue of probable cause was one for decision by the Court, for as said in **Banish v. Locks**, 7 Cir., 414 F. 2d 638, 641:

> ". . . There being no conflict in the evidence, the question of probable cause was a question of law for the court, . . .
>
> "As the above authorities indicate, under the general principles of tort liability, the issue of probable cause is to be determined by the court when there is no disagreement as to the facts or circumstances surrounding the arrest, detention and prosecution."

The decision of the Eighth Circuit herein is in conflict with the decision of the Seventh Circuit in the holding that the issue of probable cause was properly submitted to the jury.

On the issue of probable cause, the evidence most favorable to the defense was as follows:

In **No. 19,825**, the arrest of Mr. Giordano on March 30, 1967, was based, according to Capt. Lee's testimony, on

some police reports of gambling arrests of other people in December, 1966 (A. 44), and on information from four informants, three of whom were unidentified. Two had given previous information to police, unrelated to Mr. Giordano, but the only information they furnished about Mr. Giordano was that he had been on premises, at unspecified dates, where, at other times, there had been other gambling arrests and a murder (A. 46-48, 56-57). The only named informant had given reliable information unrelated to Mr. Giordano in 1955, had said in 1959 that Mr. Giordano was becoming involved in gambling, and died in 1966 (A. 48-51). The fourth informant told of threats in 1965 by Mr. Giordano's nephew, allegedly in behalf of Mr. Giordano, concerning a gambling operation of the informant (A. 51, 58).

In **No. 19,826**, the arrests of Mr. Giammanco and Mr. Licavoli at an American Legion club on April 19, 1967, were based upon police reports which the officers read concerning prior arrests of the two men (A. 60, 64-70, 75-76), although no warrants or trials resulted (A. 73), the fact that Lt. Brown had seen Mr. Giammanco at Kincannon's twice, but not doing anything illegal (A. 76, 81), and Mr. Giammanco's prior conviction on a Federal liquor violation and 15 or 20 gambling arrests without conviction (A. 78). In addition, Capt. McKeone received an anonymous phone call a month before the arrest that gambling was taking place at the Legion club (A. 61). On surveillance of the club, the officers saw Mr. Giammanco three or four times and his car parked in the vicinity; they also saw him come out, look around, stand on the sidewalk, drive in the neighborhood, and wipe off his car, but he did nothing more illegal than park in a no-parking zone (A. 61-63, 74, 77-78, 82). At the time of the arrest, they saw no gambling activity nor had they talked to anyone who had placed a bet or played cards with Mr. Giammanco (A. 71-72, 84).

In **No. 19,827**, the first arrest of Mr. Giammanco by Capt. Lee and Sgt. Weingart was on May 9, 1967, on a robbery charge. It was based upon information received by the Sergeant from an anonymous informant whom he had never met, did not know by name, and would not know how to contact (A. 94-95). The informant presumably was the same unidentified person who had supplied information to him twice previously (A. 89-90). The informant said that he had seen Mr. Giammanco run from an A & P Store which was held up (A. 90). There were a number of differences between the description of the holdup man in the police report and that of Mr. Giammanco, and the officers were aware of the discrepancies (A. 85, 95-96, 102, 111), but they showed no pictures of Mr. Giammanco to the victim and decided to arrest on the basis of the phone call only (A. 99, 106).

In **No. 19,827**, the second arrest of Mr. Giammanco by Capt. Lee and Sgt. Weingart was on February 23, 1968, the day the officers learned they had been sued by Mr. Giammanco (A. 101, 115). The arrest was on a gambling charge based upon a phone call received by Capt. Lee from an anonymous woman who told him to go to a Ninth and Delmar barber shop at 12:30 to get an unidentified man calling bets in (A. 109, 119). He did not know the woman or whether she was reliable (A. 116). In addition, the arrest was based upon the reputation of the barber shop as a place frequented by gamblers, although there had been no arrests there (A. 108, 116-118), Mr. Giammanco's background of gambling and prior arrests (A. 107), and the fact that Mr. Giammanco was on the phone and had a piece of paper with two numbers (A. 118).

* * * * * * *

Bearing in mind the previous discussion in this petition concerning the necessity and elements of probable cause, we believe that all of the trials showed conclusively that there was none for any arrest.

In many respects, the trial testimony of the officers to support their contention that they had probable cause to make the arrest was similar to the statements made in their answers to interrogatories, discussed above as to the motions for summary judgment. Thus, the activities of each petitioner as testified by the officers showed no criminal conduct. There were no facts constituting probable cause. Not one informant had sufficient reliability or corroboration to justify a finding of probable cause, under the doctrine of **Aguilar v. Texas**, 378 U. S. 108, and **Spinelli v. United States**, 393 U. S. 410.

Another important factor in the determination of this issue is that the arrests were made for specific offenses on particular dates; yet the information which the officers sought to use to justify the arrests, particularly in those matters pertaining to gambling arrests, was based upon general reputation and uncorroborated reports of continuing gambling activities over periods of months or even years. (See No. 19,825.) The lesson of **Spinelli** is clear that reputation is entitled to "no weight." An arrest for a specific gambling offense based upon reports of lengthy past or continuing gambling activity is a contradiction in terms.

It is significant also that in every instance the officers did not apply for an arrest warrant either before or after the arrest. There was never any showing of the necessity for hasty action without a prior application for a warrant. In some instances, particularly the gambling matters in Nos. 19,825 and 19,826, the officers claimed to have had information for months prior to the date of the arrest. In the robbery matter (No. 19,827) there was no suggestion that Mr. Giammanco was likely to flee while an application for a warrant was being prepared. The same is true as to the second arrest in No. 19,827, because the indication from the anonymous woman caller was that this was a continuing activity on a daily basis. In none of

these cases was there evidence that a judge was unavailable for the issuance of an arrest warrant. There was nothing to indicate that the officers did not have time to obtain an arrest warrant, or that any evidence was likely to be destroyed while making such application.

Where the officer has an opportunity to obtain a warrant and there is no justification for not applying, we believe he is not permitted to arrest without a warrant. See **Jones v. United States**, 357 U. S. 493, and **Chapman v. United States**, 365 U. S. 610. Cf. **Chimel v. California**, 395 U. S. 752, where this Court said as to the necessity for a search warrant (l. c. 762):

> "Clearly, the general requirement that a search warrant be obtained is not lightly to be dispensed with, and 'the burden is on those seeking [an] exemption [from the requirement] to show the need for it . . .' **United States v. Jeffers**, 342 U. S. 48, 51."

See also **Vale v. Louisiana**, 399 U. S. 30, 35.

An application for a warrant would have safeguarded the rights of petitioners by requiring the officer to make a showing of probable cause to a magistrate. Without such a showing, an arrest warrant would not have issued. If probable cause could not be shown to the magistrate for the issuance of an arrest warrant, then there was no probable cause for making an arrest without a warrant.

Probably the most significant testimony in these proceedings was that of the officer in every case that he did not have enough, sufficient, or proper evidence or probable cause to apply for a warrant (A. 53, 74-75, 83, 97-98, 114-115). But probable cause is probable cause, whether it is with or without a warrant. The Fourth Amendment requirement of probable cause applies with equal force to arrests with or without warrants. As stated in **Spinelli v. United States**, 393 U. S. 410, 417 (fn. 5):

> "While **Draper** involved the question whether the police had probable cause for an arrest without a warrant, the analysis required for an answer to this question is basically similar to that demanded of a magistrate when he considers whether a search warrant should issue."

See also **Wong Sun v. United States,** 371 U. S. 471.

Ordinarily, the issue of probable cause arises in a case where an arrested person seeks to suppress some incriminating evidence seized from him as an incident of an arrest without a warrant. The issue does not arise in that fashion in these cases, but we think a question ought to be posed: Suppose petitioner in each case were a defendant in a criminal case seeking to suppress evidence seized from him with the facts of the arrests in these cases; could anyone doubt that the Court would be required to suppress such evidence? Similarly, there can be no doubt that, as a matter of law, there was no probable cause in any of these arrests.

Because of the lack of probable cause, the only defense available to respondents was nonexistent. Petitioners were therefore entitled to a directed verdict in every case. The trial Courts erred in submitting the issue of liability to the juries, and the opinion of the Court of Appeals was in error in holding "that reasonable minds could differ as to whether or not the officers acted in good faith and with probable cause" (As to the issue of good faith, see Question II hereof). There was nothing upon which reasonable minds could differ, because, even if the evidence of respondents were accepted without question, there still was no probable cause as a matter of law. Petitioners were entitled to directed verdicts on the issue of liability. See **Nesmith v. Alford**, 5 Cir., 318 F. 2d 110, 124-125, cert. den. 375 U.S. 975, and **Whirl v. Kern**, 5 Cir., 407 F. 2d 781, 793, cert. den. 396 U.S. 901.

* * * * * * *

Because of the conflict of the decision of the Eighth Circuit herein with the decisions of this Court[6] on the issue and elements of probable cause, and because of the conflict between the decisions of the Eighth Circuit and of this Court[7] and other Circuits[8] on the evidence necessary for judgments under Title 42, United States Code, Section 1983, and because of the importance of a clarification by this Court of the rights of persons arrested without probable cause to seek redress under Section 1983, we respectfully submit that certiorari should be granted as to Question I.

II

Whether respondent police officers were entitled to rely upon good faith as a defense to petitioners' actions under 42 U.S.C., § 1983:

A.) **Where the defense of good faith was not pleaded and there was no evidence tending to establish such defense, and**

B.) **Where the arrests were made without a warrant and without probable cause.**

In Question I, the issue has been raised as to the existence of probable cause, as a factual matter and as an issue of law. Question II is concerned with the issue of good faith.

A. The Court of Appeals properly recognized (p. 1230 of 434 F. 2d), that good faith is an available defense to a civil rights action for wrongful arrest under 42 U.S.C.,

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[6] See cases from **Draper** to **Spinelli** discussed above.

[7] See **Monroe v. Pape, Pierson v. Ray,** and **Adickes v. S. H. Kress and Company.**

[8] See, for example, **Cohen v. Norris, York v. Story, Basista v. Weir, Nesmith v. Alford, Whirl v. Kern,** and **Joseph v. Rowlen.**

§ 1983, as has been held by this Court in **Pierson v. Ray,** 386 U. S. 547. But we believe that the Court of Appeals erred in holding that the issue was in this case, because the defense of good faith was not pleaded and there was absolutely no evidence that the officers acted on any good faith belief in making the various arrests of petitioners.[9] The only issue was probable cause.

B. In **Joseph v. Rowlen,** 7 Cir., 402 F. 2d 367, the Seventh Circuit stated (l. c. 370):

> "Although the Supreme Court refers in **Pierson (v. Ray,** 386 U. S. 547) to 'the defense of good faith and probable cause', available to a police officer under sec. 1983, there is no suggestion that a police officer is entitled to a defense of good faith when he makes an arrest without a warrant and without probable cause."

As shown in the argument above on Question I, each petitioner here was arrested without a warrant and without probable cause. Thus under the doctrine of **Joseph v. Rowlen,** respondents were not entitled to the defense of good faith, even if pleaded. The Court of Appeals for the Eighth Circuit is in conflict with the Seventh Circuit in this respect. We respectfully suggest that, if the requirement of probable cause under the Fourth Amendment is to have any meaning, the rule of the Seventh Circuit is the sounder view.

* * * * * * *

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[9] Contrary to the suggestion of the Court of Appeals opinion (fn. 2 at page 1230 of 434 F. 2d) that no error was claimed as to the submission of the good faith question to the jury, petitioners throughout the proceedings in the trial Court objected to any consideration of such an issue and vigofously objected to the giving of instructions pertaining to good faith, always on the ground that there had been no pleading or evidence of good faith.

Because of the departure by the Court of Appeals from the accepted and usual course of judicial proceedings in making the defense of good faith available where it is neither pleaded nor the subject of evidence, and because of the conflict between the decisions of the Eighth Circuit and the Seventh Circuit, and because of the need to avoid erroneous interpretations by Courts of Appeals of decisions of this Court, we respectfully submit that certiorari should be granted as to Question II.

CONCLUSION

For these reasons, it is respectfully submitted that this petition for certiorari should be granted.

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APPENDIX

APPENDIX A

United States Court of Appeals
for the Eighth Circuit

No. 19,825.

Anthony Giordano, Appellant,

v.

Harry J. Lee, Edwin Roth and Roey Stetson, Appellees.

No. 19,826.

James Giammanco, Appellant,

v.

Charles McKeone and William Brown, Appellees.

No. 19,827.

James Giammanco, Appellant,

v.

Harry J. Lee and John Weingart, Appellees.

Appeals from the United States District Court for the Eastern District of Missouri.

[December 4, 1970]

Before Matthes, Chief Judge; Heaney, Circuit Judge; Van Pelt, Senior District Judge.

Matthes, Chief Judge.

These consolidated appeals result from three separate actions brought in the United States District Court for the Eastern District of Missouri for damages under the Civil Rights Act, 42 U.S.C. § 1983, for wrongful arrests alleged to have been made by the individually named police officers of the City of St. Louis. Motions for summary judgments by appellants were denied in each case and each cause was separately tried to a jury. Appellants' motions for directed verdicts also were denied, and a judgment was entered in each case for the defendant police officers in accordance with jury verdicts in their favor.[1]

The three actions in the district court involved four different arrests. No. 19,825 concerns the arrest without a warrant of appellant Giordano on March 30, 1967 by Capt. Lee, assisted by Lt. Roth and Det. Stetson. The record shows that on that date the named officers went to 2600 North Broadway in St. Louis to question Giordano about gambling activities and a murder which had occurred early that same morning at 4123 Chippewa Street, premises known to police to be the site of illicit gambling activities and known to have been frequented by Giordano. According to both the answers to the interrogatories and the testimony of the police officers, Giordano, when approached for questioning, became extremely nervous and grabbed at Capt. Lee's arm. At trial Capt. Lee testified that he had originally intended only to question Giordano, but that due to his violent behavior he placed him under arrest in order to avoid a more serious disturbance. Conversely,

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[1] Nos. 19,825 and 19,826 were separately tried before a jury with Chief Judge Roy W. Harper presiding in each case. No. 19,827 was tried to a jury with Judge James H. Meredith presiding. In No. 19,825 Judge Harper directed a verdict for defendants Lt. Roth and Det. Stetson. It is not contended on appeal that the trial court's ruling as to those defendants was erroneous.

Giordano contended that he was grabbed and pushed by the police officers and that he was lawfully and peacefully conducting himself at the time of arrest.

No. 19,826 concerns the warrantless arrest of appellant Giammanco and one Licavoli (not a party to this action) by Capt. McKeone and Lt. Brown on April 19, 1967 at an American Legion Club for operating a handbook and card playing on that date. The record shows that in February of 1967 Capt. McKeone received information from the Intelligence Division of the Police Department that gambling was being conducted at the Legion Club, that an arrest for gambling had been made in January of 1967 in which gambling paraphernalia was seized, and that Giammanco and others had been seen at the Club. Pursuant to this information, a surveillance was placed on the Club. During the several weeks preceding the arrest in question, Capt. McKeone had personally observed Giammanco enter the Club. On a number of occasions he would come out of the Club, look about the area in a suspicious manner, and then re-enter the building. On the day of the arrest Capt. McKeone and Lt. Brown saw Giammanco enter the Club. They then approached the building, found the inner door locked, and knocked on the door. After a lapse of 3-5 minutes, during which time they heard voices and scuffling noises akin to the moving of furniture from inside, Licavoli, who had been arrested on those same premises some months earlier with gambling paraphernalia in his possession, opened the door. Capt. McKeone then attempted to interrogate Licavoli and Giammanco about gambling activities at the Club. Giammanco became excited, jumped out of his chair, began raising his voice and hurried to make a phone call. He and Licavoli were then placed under arrest.

No. 19,827 involves two separate arrests of appellant Giammanco by Capt. Lee and Sgt. Weingart. On May 9,

1967, those officers without a warrant arrested Giammanco for the robbery of an A & P Market. In their answers to interrogatories the officers stated that the arrest was made after Sgt. Weingart received a telephone call from an informant, known to him by voice, who identified Giammanco by name as the perpetrator of the robbery. At trial it was also brought out that the informant had told the police that he saw Giammanco run from the market immediately after the robbery was committed. The officers testified that the informant was known to them by his unusual vocal characteristics and that he had previously given the police accurate data. Information given by this same person on other occasions had led to the recovery of a stolen KSD-TV movie camera and an arrest for buying and receiving stolen property and for possession of pornographic material. On another occasion, a tip given the police by the same informant led to the recovery of $40,000 worth of United States Postal Money Orders and a postal validating machine.

On February 23, 1968 Capt. Lee and Sgt. Weingart without a warrant arrested appellant Giammanco in a barber shop on Ninth and Delmar Streets for gambling. The arrest was made after Capt. Lee received a telephone call from a woman who told him that between 12:15 and 12:30 p.m. each day a white male used the barber shop telephone to call in betting tabs. The officers went to the barber shop at 12:15 p.m. to investigate and saw a man on the phone with a piece of paper in his hand. As he turned and saw the officers, he hurriedly hung up the phone. The police then recognized him as Giammanco and arrested him for gambling. Evidence adduced at trial revealed that at the time of arrest the officers knew that the barber shop had previously been the terminal point in a chain of gambling activities whereby two men who made various stops in the city to pick up betting tabs would culminate their rounds at the barber shop. One of these men had

been convicted of interstate transportation in aid of racketeering for his part in these activities. It was also shown that the barber shop was known to police as a place frequented by gamblers.

Appellants seek a reversal and a remand for a new trial on the question of damages only. They limit their contentions to claimed error in the district court's denial of their motions for summary judgment and for directed verdicts on the question of liability.

Before considering each of the issues raised, we take cognizance of some general principles concerning civil rights actions for wrongful arrest under 42 U.S.C. § 1983. The propriety of such an action has been recognized by the Supreme Court in *Monroe v. Pape*, 365 U.S. 167 (1961), *Pierson v. Ray*, 386 U.S. 547 (1967), and most recently in *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970). In order to recover it must be shown that the arresting officer was acting under color of state law and that he deprived plaintiff of a constitutional right. *Adickes v. S. H. Kress & Co.*, supra at 150; *Whirl v. Kern*, 407 F.2d 781, 789 (5th Cir. 1968), *cert. denied*, 396 U.S. 901 (1969). In *Pierson v. Ray*, supra at 557, the Supreme Court held that "good faith and probable cause" is a defense to the action.[2] Our research also leads us to conclude that in civil rights actions of this nature, where a genuine issue of fact on the existence of probable cause for arrest is presented, the question should be submitted to the jury: See *Adickes v. S. H. Kress & Co.*, supra; *Anderson v. Haas*, 341 F.2d 497 (3d Cir. 1965); *Maryland v. Heyse*, 315 F.2d 312 (10th Cir. 1963); see also *Beauregard v. Wingard*, 362 F.2d 901 (9th Cir. 1966); *Stringer v. Dilger*, 313 F.2d 536 (10th Cir. 1963).

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[2] In instructing the jury, the district court submitted the question of whether the police officers acted in good faith and with probable cause. No error as to this submission is claimed on appeal.

We now consider appellants' contention that the district court erred in refusing to enter summary judgments in their favor on the issues of liability. Appellants claim that they were entitled to summary judgments because the police officers' answers to interrogatories showed, as a matter of law, that the arrests were made without probable cause, and that no genuine issue of fact on this question was presented. We disagree.

Summary judgment under Rule 56, Fed. R. Civ. P., is an extreme remedy which should be sparingly employed. *City National Bank of Fort Smith, Arkansas v. Vanderboom*, 422 F.2d 221, 223 (8th Cir.), *cert. denied*, 399 U.S. 905 (1970); *Williams v. Chick*, 373 F.2d 330, 331 (8th Cir. 1967); *Smoot v. Chicago, Rock Island and Pacific Railroad Co.*, 378 F.2d 879, 883 (10th Cir. 1967), holding that granting a summary judgment under Rule 56 is a "drastic" remedy. Further, as we stated in *Williams*, supra at 332, "a summary judgment proceeding does not provide a very satisfactory approach in tort cases." In *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467 (1962) the Supreme Court set down the following guidelines on the application of summary judgment procedure:

> "Summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions filed in the case 'show that [except as to the amount of damages] there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' Rule 56(c), Fed. Rules Civ. Proc. This rule authorizes summary judgment 'only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, . . . [and where] no genuine issue remains for trial . . . [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.' *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944)."

It is also settled doctrine that any inferences to be drawn from the underlying facts contained in the materials presented must be viewed in the light most favorable to the party opposing the motion for summary judgment. *Adickes v. S. H. Kress & Co.*, supra at 158-159; *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Any doubt as to whether there is an issue of material fact for trial should be resolved against the moving party. *Williams v. Chick*, supra at 331; *Jacobsen v. Maryland Casualty Company*, 336 F.2d, 72, 74 (8th Cir. 1964), *cert. denied*, 379 U.S. 964 (1965); *Technograph Printed Circuits, Ltd. v. Methode Electronics, Inc.*, 356 F.2d 442 (7th Cir.), *cert. denied*, 384 U.S. 950, 1002 (1966).

In light of these principles we find that the district court, in each of these cases, properly denied the motions for summary judgment. In No. 19,825, clearly a disputed issue was presented as to whether appellant Giordano's alleged hysterical behavior precipitated his arrest. As to the actions brought by appellant Giammanco, the answers to his interrogatories did not conclusively demonstrate the unreliability of police informants or disclose in detail all the circumstances surrounding his arrests. Where the supporting evidentiary matter of the moving party reveals "unexplained gaps" or where the truth is not certain, the movant has not sustained the burden of demonstrating the absence of a genuine issue of fact. See *Adickes v. S. H. Kress & Co.*, supra at 158; *Williams v. Howard Johnson's Inc. of Washington*, 323 F.2d 102, 107 (4th Cir. 1963).

This brings us to the assertion that the district court erred in refusing to grant appellants' motions for directed verdicts on the ground that the evidence presented showed, as a matter of law, that there was no probable cause for the arrests. It is fundamental that a motion for directed verdict is properly denied where the evidence presented allows reasonable men in a fair exercise of their judgment

to draw different conclusions. A directed verdict is in order only where the evidence points *all one way* and is susceptible of *no* reasonable inferences sustaining the position of the nonmoving party. *Halladay v. Verschoor,* 381 F.2d 100, 114 (8th Cir. 1967); *Chicago Great Western Railway Company v. Casura,* 234 F.2d 441, 447 (8th Cir. 1956); *Lumbermans Mutual Casualty Company v. Rhodes,* 403 F.2d 2, 7 (10th Cir. 1968), *cert. denied,* 394 U.S. 965 (1969). In making this determination, the evidence, together with all reasonable inferences to be drawn therefrom, must be viewed in the light most favorable to the nonmoving party. *Simpson v. Skelly Oil Company,* 371 F.2d 563, 567 (8th Cir. 1967); *Altrichter v. Shell Oil Company,* 263 F.2d 377, 380 (8th Cir. 1959).

We pretermit a detailed review of the evidence bearing upon the issue of probable cause. Suffice it to say that we have carefully examined the record and have tested the sufficiency of the evidence, under the principles above enunciated, to determine the propriety of the submission of the issue of liability to the jury. Viewing the evidence as we must, in the light most favorable to the appellees, we are not constrained to hold that the district court erred in not granting directed verdicts for appellants. Rather, we think that the evidence adduced as to each of the four arrests, coupled with the inferences therefrom, was such that reasonable minds could differ as to whether or not the officers acted in good faith and with probable cause.

Accordingly, the judgments entered upon the jury verdicts should be and are hereby affirmed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

Judgment

United States Court of Appeals
For the Eighth Circuit

Nos. 19,825-26-27 September Term 1970

No. 19,825
Anthony Giordano, Appellant,
vs.
Harry J. Lee, Edwin Roth and Roey Stetson, Appellees.
No. 19,826
James Giammanco, Appellant,
vs.
Charles McKeone and William Brown, Appellees.
No. 19,827
James Giammanco, Appellant,
vs.
Harry J. Lee and John Weingart, Appellees.

Appeals from the United States District Court for the Eastern District of Missouri.

These Causes came on to be heard on the record from the United States District Court for the Eastern District of Missouri and were argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, in these causes, be, and the same are hereby, affirmed.

December 4 1970

APPENDIX C

United States Court of Appeals
For the Eighth Circuit

September Term, 1970

No. 19,825		
Anthony Giordano,	Appellant,	
vs.		
Harry J. Lee, et al.,	Appellees.	
No. 19,826		Appeals from the United States District Court for the Eastern District of Missouri.
James Giammanco,	Appellant,	
vs.		
Charles McKeone, et al.,	Appellees.	
No. 19,827		
James Giammanco,	Appellant,	
vs.		
Harry J. Lee, et al.,	Appellees.	

The Court having considered petition of appellants for rehearing en banc and, being fully advised in the premises, it is now here ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is now here ordered that the petition for rehearing also be, and it is hereby denied.

December 29, 1970

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1521

ANTHONY GIORDANO,
Petitioner,
v.
HARRY J. LEE, EDWIN ROTH and ROEY STETSON.

JAMES GIAMMANCO,
Petitioner,
v.
CHARLES McKEONE and WILLIAM BROWN.

JAMES GIAMMANCO,
Petitioner,
v.
HARRY J. LEE and JOHN WEINGART.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statement of the Case	2
Argument I	9
Argument II	16
Conclusion	17

CITATIONS

Cases:

Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970)	10
Altrichter v. Shell Oil Company, 263 F.2d 377, 380 (8th Cir. 1959)	11
Bass v. United States, 326 F.2d 884	12
Beauregard v. Wingard, 362 F. 2d 901 (9th Cir. 1966)	17
Caldwell v. United States, 338 F.2d 385 (CA 8th 1964)	14
City National Bank of Fort Smith, Arkansas v. Vanderboom, 422 F. 2d 211, 223 (8th Cir.) cert. denied, 399 U.S. 905 (1970)	9
Cochran v. United States, 291 F.2d 633, 636	14
Dupree v. United States, 380 F.2d 233, cert. denied 88 S.Ct. 2289, 392 U.S. 944, 20 L.Ed.2d 1407	11

Jacobsen v. Maryland Casualty Company, 336 F.2d 72, 74 (8th Cir. 1964), cert. denied, 379 U.S. 964 (1965) 10

Joyce v. Ferrazzi, 323 F.2d 931 (1st Cir. 1963) 10, 11

Marland v. Heyse, 315 F.2d 312 (10th Cir. 1963) ... 17

Mulligan v. United States (CA 8th 1966), 358 F.2d 604 14

Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 467 (1962) 9

Simpson v. Skelly Oil Company, 371 F.2d 563, 567 (8th Cir. 1967) 11

Smoot v. Chicago, Rock Island & Pacific Railroad Co., 378 F.2d 879, 883 (10th Cir. 1967) 9

Spinelli v. United States, 393 U.S. 410, 216 L.Ed. 2d 638, 89 S.Ct. 584 13

Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963) .. 17

Technograph Printed Circuits, Ltd. v. Methode Electronics, Inc., 356 F.2d 442 (7th Cir. cert. denied, 384 U.S. 950, 1002 (1966) 10

United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) 10

Williams v. Chick, 373 F.2d 330, 331 (8th Cir. 1967) 9, 10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1521

ANTHONY GIORDANO,
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JAMES GIAMMANCO,
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HARRY J. LEE and JOHN WEINGART.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the United States Court of Appeals is reported at 434 F. 2d 1227 (1970). There was no opinion written by the United States District Court.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on December 4, 1970. Petitioners filed a petition for rehearing en banc or, in the alternative, for a rehearing which was denied on December 29, 1970. Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C., Sec. 1254 (1).

QUESTIONS PRESENTED

I

Whether Petitioners Were Entitled to a Summary Judgment Before Trial or a Directed Verdict After Trial on the Issue of Liability Only Because the Arrests of Petitioners Were Not in Good Faith and Without Probable Cause in Violation of Title 42, United States Code, Section 1983.

II

Whether Respondent Police Officers Could Rely on the Defense of Good Faith in Making the Arrests Especially When No Error Was Claimed in Submitting Such Issue to the Jury.

STATEMENT OF THE CASE

Respondents adopt petitioners' statement of the case and submit the following facts of the arrests:

Court of Appeals No. 19,825

Giordano v. Capt. Harry J. Lee, Lt. Edwin Roth and Detective Roey Stetson Arrest of March 30, 1967

The events leading up to the arrest were that Captain Lee was investigating a murder which occurred at Kincannon's Bar located at 4123 Chippewa Street, St. Louis, Missouri, at 12:10 a.m. on March 30, 1967 (A 42-43). He had official knowledge of gambling arrests from police reports of a gambling arrest which took place in December of 1966 wherein persons were arrested, including James Giammanco (A 44). The physical characteristics are a barroom with a capacity of 45 to 50 persons and at the top of the stairs to the second floor is a reinforced metal

door barred on the inside with a crowbar (Tr. 84). Inside the room is a large circular table and numerous chairs and tables (Tr. 85).

On March 10, 1967, while inside Kincannon's Bar, Captain Lee met an informant who previously, about the 1st of February, 1967, had given reliable information about a holdup which was to occur at 2921 South Brentwood Boulevard at the Stewart In-Fra-Red Commissary, and the holdup actually did occur in which one of the men was killed and another was apprehended a block away (A 45-46). On the parking lot of Kincannon's, the informant advised Captain Lee that James Giammanco, nephew of Giordano, was in there many times, and on one or two occasions with Giordano (A 46-47). The informant said there was gambling going on upstairs and that he had seen Giordano and his nephew go up the stairs two weeks prior to March 1, 1967 (A 47).

Another reliable informant, Warpy Smith, deceased, told Captain Lee in 1959 that Giordano was putting the muscle on him and that he was putting the "chop" on all gambling going on in St. Louis (A 50-51). In 1965 (A 51) an operator of a coffee house who allowed his patrons to play cards on the premises, was told by Giammanco that his uncle Giordano was a 50% partner from that day on or else he was out of business (5 Tr. 96).

Captain Lee testified he arrested Giordano on March 30, 1967, for gambling which took place between December 20 to March 30, 1967 (A 59) at Kincannon's Bar at 4123 Chippewa Street in the City of St. Louis, Missouri; he further testified that he was investigating a murder which occurred in Kincannon's Bar the early morning hours of March 30, 1967, and since the homicide division was short of help, he went to a restaurant at 2622 North Broadway to look for James Giammanco and Anthony Giordano accompanied by Lt. Roth, Detective Stetson, and Sgt.

Armstrong (A 43). Captain Lee walked past Giordano to the areaway which goes from the restaurant to the banana place, and Giordano jumped off the stool in the restaurant and he asked what Captain Lee was doing in the hallway, and Captain Lee told him he wanted to ask some questions, and after asking him some questions he became very excited and almost in a hysterical state, he began waving his arms around and shouting and screaming, grabbed Captain Lee's arm in a halfway blow or clutching motion and told him he had no right to come into his place and that he wasn't going to answer any questions. Captain Lee told him, "You've got to be calm. I want to talk to you." He kept on getting louder and louder and more hysterical, and he was placed under arrest for general peace disturbance (A 43). He swung his arms around violently and he did grab Captain Lee by the arm. Captain Lee placed him under arrest to keep the thing from boiling up to a more serious thing. Captain Lee did not grab at Giordano (A 51-52).

Captain Lee testified that he arrested Giordano for gambling over a three-month period from January to March 30, 1967 (A 52). He further testified that Giordano became practically hysterical, and he removed him from the scene by taking him into custody, and that was one of the reasons he was arrested (Tr. 116).

Mr. Giordano, on cross-examination, didn't know about his reputation being hurt (Tr. 69). Giordano at the time of arrest had a collar on his neck for a pinched nerve (Tr. 10), but he did not experience very much pain when grabbed by Captain Lee (Tr. 17). He believes he paid $50.00 or $75.00 to a Mr. Biondo for a bond, and he owes fees for legal services (Tr. 18). He further testified he paid about $125.00 or $150.00 for legal services (Tr. 19).

Court of Appeals No. 19,826

Giammanco v. Capt. McKeone and Lt. Brown
Arrest of April 19, 1967

Captain McKeone arrested Giammanco on April 19, 1967, at 1116 North 10th Street in a Legion Post (A 60). Pursuant to a telephone call (A 61) and reports for the Intelligence Unit that gambling was going on at the club (A 60), he made personal observations of the Legion Post between March 17 and April 19, 1967, checking the club three to four times a week, watching who entered and left (A 61-62). He observed Giammanco and a person named Licavoli enter the club three or four times during the surveillance and several times saw Giammanco come out of the door and stand on the sidewalk, look in all directions and go back inside (A 62).

Captain McKeone was also aware that Licavoli was arrested at the club on January 12, 1967, for being the custodian of a bet and upon searching him they found bet tabs in his pocket and a form book near the phone (A 65). Captain McKeone read into evidence police reports read by him prior to the instant arrest. Officers from the Third District on October 27, 1966, arrested James Giammanco and five other persons at Kincannon's Bar. The officers heard voices conclusive to poker playing, saw a 72-inch round table, 5 decks of cards and score sheets near the table (A 66-67).

The police reports further reflected an arrest on December 20, 1966, at Kincannon's Bar of three of the four same persons arrested in October, 1966, two others, and Giammanco. The officers entered the room and the occupants were watching television. However, two other officers heard a window open of Kincannon's and heard something hit the adjoining roof which turned out to be three decks of playing cards (A 68-69).

On the date of the arrest the front door of the Legion Post was open and Captain McKeone and Lt. Brown proceeded through the open door but the second door was locked. They knocked on the door and identified themselves, heard people moving around and some scuffing of chairs, and after three or four minutes Licavoli opened the door. Captain McKeone indicated he wanted to talk to them, arrested Giammanco and Licavoli and patted down the exterior of their persons (A 70). They were taken to police headquarters, questioned and released about four hours (Tr. 88-89).

Court of Appeals No. 19,827

Giammanco v. Capt. Lee and Sgt. Weingart
Arrest of May 9, 1967

On March 22, 1967, Mr. Paul Merli, manager of an A & P store located at 3641 South Jefferson, was held up and $290.00 was taken by an unknown white male armed with a revolver (A 105). On March 29, 1967, a Robert Voyles was arrested for the robbery, but the victims could no positively identify him (A 105).

The events leading up to the arrest of Giammanco were information received by an informant. To demonstrate the reliability of the informant, Sgt. Weingart testified Lt. Roth and he conversed several times about the informant who referred to Lt. Roth as "Sgt. Rott" (A 88). On a prior occasion the informant told Weingart that a stolen KSD-TV camera would be located at 2605 Olive Street. After determining that the camera had been stolen from police reports, Weingart and Roth went to the location, recovered the camera and some pornographic material, and arrested a subject there (A 89).

On another occasion the informant asked for "Sgt. Rott," and he being not in, Weingart took the message

that if they wanted to recover a bundle of stolen postal money orders, look behind the hedge on Louisiana just south of Lafayette Avenue. Forty Thousand Dollars of money orders were recovered (A 90).

On the day of the arrest of Giammanco, the informant called and stated to Weingart that if you want the person who held up the A & P store, get the Italian boy, Jimmy Giammanco. He stated he had seen him run from the store and get into a beat-up car. He did not convey this information sooner because he didn't know the name of Giammanco then (A 90). The same informant had given information on a stolen IBM typewriter, but by the time the tip was received, the person who had stolen it was already in custody (A 104).

After Giammanco was arrested, he was brought to the Robbery Division, and he was viewed by the victim of the robbery, Paul Merli, who could not identify Giammanco as the person who robbed him (A 106). Giammanco was released shortly thereafter (A 107).

Court of Appeals No. 19,827

Giammanco v. Capt. Lee and Sgt. Weingart
Arrest of February 23, 1968

The events preceding the arrest of Giammanco at the barber shop at 802 North Ninth Street were given by Capt. Lee. He learned that gambling activities were taking place there by surveillances of different persons. John Vitale would pick up Dave Cutter, drive him to Spring and Olive, pick up papers, then go to Grand and Olive, pick up other papers, then stop in other places in the City, and terminate the trip at the barber shop. Five other persons who were arrested for gambling were frequenting the barber shop including Giammanco. The investigation of these activities culminated in the arrest of

Dave Cutter, who was convicted on charges of interstate transportation in aid of racketeering (A 108).

On the morning of the arrest, Capt. Lee received a phone call from an unidentified female who sounded as if she were emotionally involved. She spoke of a gambling raid in South St. Louis and stated why don't you do something about the place on Ninth and Delmar. She told Capt. Lee that if you want to get the guy who is calling all the bets in, go to Ninth and Delmar at 12:30 and you will see him on the phone (A 109). At 12:30, Capt. Lee and Sgt. Weingart went to the barber shop and there was a man on the telephone, and after he turned around, they saw he was Giammanco. He hung up the phone hurriedly and had a piece of paper in his hand; he was placed under arrest (A 110). The piece of paper had two phone numbers on it (A 110). Capt. Lee allowed him to keep the paper because if he seized the paper, Giammanco would be entitled to a phone call and the handbook would be moved; Capt. Lee felt if he could get the paper from Giammanco's property, he would be able to locate the handbook (Tr. 126). However, the paper was not found after Giammanco went to the men's room in the police station (Tr. 127).

ARGUMENT

I

Whether Petitioners Were Entitled to a Summary Judgment Before Trial or a Directed Verdict After Trial on the Issue of Liability Only Because the Arrests of Petitioners Were Not in Good Faith and Without Probable Cause in Violation of Title 42, United States Code, Section 1983.

Summary Judgment

Summary judgment under Rule 56, Fed. R. Civ. P., is an extreme remedy which should be sparingly employed. **City National Bank of Fort Smith, Arkansas v. Vanderboom,** 422 F.2d 211, 223 (8th Cir.), **cert. denied,** 399 U.S. 905 (1970); **Williams v. Chick,** 373 F.2d 330, 331 (8th Cir. 1967); **Smoot v. Chicago, Rock Island and Pacific Railroad Co.,** 378 F.2d 879, 883 (10th Cir. 1967), holding that granting a summary judgment under Rule 56 is a "drastic" remedy. Further, as we stated in **Williams,** supra at 332, "a summary judgment proceeding does not provide a very satisfactory approach in tort cases." In **Poller v. Columbia Broadcasting System, Inc.,** 368 U.S. 464, 467 (1962), the Supreme Court set down the following guidelines on the application of summary judgment procedure:

> "Summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions filed in the case 'show that [except as to the amount of damages] there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' Rule 56(c), Fed. Rules Civ. Proc. This rule authorizes summary judgment 'only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, . . . [and where] no genuine issue remains

> for trial . . . [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.' **Sartor v. Arkansas Natural Gas Corp.**, 321 U.S. 620, 627 (1944)."

It is also settled doctrine that any inferences to be drawn from the underlying facts contained in the materials presented must be viewed in the light most favorable to the party opposing the motion for summary judgment. **Adickes v. S. H. Kress & Co.**, supra at 158-159; **United States v. Diebold, Inc.**, 369 U.S. 654, 655 (1962). Any doubt as to whether there is an issue of material fact for trial should be resolved against the moving party. **Williams v. Chick**, supra at 331; **Jacobsen v. Maryland Casualty Company**, 336 F.2d 72, 74 (8th Cir. 1964) **cert. denied**, 379 U.S. 964 (1965); **Technograph Printed Circuits, Ltd. v. Methode Electronics, Inc.**, 356 F.2d 442 (7th Cir.), **cert. denied**, 384 U.S. 950, 1002 (1966).

Summary Cause No. 19,825
Giordano v. Lee, et al.

In Cause 19,825, the Answers to Interrogatories of Capt. Lee (17K6, A 18-19), the substance was that he was investigating a murder, knew the place where the murder was committed was used for gambling, had reasonable belief that the murder was precipitated by gambling and that Giordano had knowledge of the gambling activities at this location and decided to question Giordano at his place of business. He became extremely nervous, grabbed Capt. Lee's arm and he was placed under arrest. Based upon this answer it is submitted that a public disturbance of the peace existed and this was the cause of his arrest. It is further submitted that this "unexplained gap" left a material issue of fact. **Adickes v. S. H. Kress & Co.**, 398 U.S. 144 (1970). In **Joyce v. Ferrazzi**, 323 F. 2d 931 (1st Cir. 1963), defendant police

officers answered a call for help from plaintiff's wife and when she admitted them to the house, the police took plaintiff into custody because of his irrational, even violent conduct, using no more force than the circumstances warranted. The Court held this action not to be a violation of plaintiff's civil rights.

Motion for a Directed Verdict
Cause 19,825 Giordano v. Lee, et al.

In determining whether a directed verdict should have been given for plaintiff Giordano, the evidence should be construed most favorably to the non moving party. **Simpson v. Skelly Oil Company**, 371 F. 2d 563, 567 (8th Cir. 1967); **Altrichter v. Shell Oil Company**, 263 F. 2d 377, 380 (8th Cir. 1959).

The evidence at trial showed that Captain Lee, accompanied by the other police officer defendants, were investigating a murder and gambling actions at the place of the murder which may have caused the murder. He had reason to believe that Giordano had been at the place of the murder and had been gambling on the second floor at this location (A 47).

In **Dupree v. United States**, 380 F. 2d 233, cert. denied, 88 S.Ct. 2289, 392 U.S. 944, 20 L.Ed. 2d 1407, it was held that police officers of the City of St. Louis have a right to question a suspect in a routine manner and such temporary detention is not an arrest. That is what occcurred in this case, but during the questioning, Mr. Giordano became hysterical and he was placed under arrest for general peace disturbance (A 43). Under the **Joyce v. Ferrazzi** case, supra, such arrest was not a violation of Giordano's civil rights.

Motion for Summary Judgment
Giammanco v. McKeone and Brown
No. 19,826

The evidence at this trial and the Answers to Interrogatories (A 24-26), viewed most favorably to defendants, was that the Legion Post was notorious for gambling activities and that one Licavoli was arrested there on January 12, 1967, and bet tabs and form books were found (A 65). In addition, he was fully aware that Giammanco was arrested on October 27, 1966 (A 66), and on December 20, 1967 (A 69), and there was no doubt from the circumstances and physical surroundings of Kincannon's Bar that gambling was taking place with Giammanco as one of the actors. The suspicious movements of Giammanco at the Legion Post in coming out the front door, looking in all directions (A 62-63), wiping off his car (Tr. 100), were circumstances, which Capt. McKeone took into consideration. After knocking on the door of the Legion Post, hearing scuffing of chairs (A 70), and knowing that Licavoli and Giammanco were inside and had conclusively been involved in gambling activities shortly before the instant arrest certainly was sufficient evidence to justify defendants in arresting Giammanco and justify the jury in determining that Capt. McKeone and Lt. Brown acted reasonably in the fact situation presented. As stated in **Bass v. United States**, 326 F. 2d 884, there was circumstantial evidence tending to show guilt and therefore probable cause for the arrest.

Summary Judgment
Giammanco v. Lee, et al.
No. 19,827 Count I
Arrest of May 9, 1967

In Cause 19827 involving two arrests by Capt. Lee and Sgt. Weingart of Giammanco, answers to interrogatories

of Sgt. Weingart that plaintiff was observed by an informant robbing an A & P Store (Answer to Interrogatory 17K7; A 32) left the credibility and reliability of the informant as a genuine issue of fact to be determined by further interrogatories or by trial to a jury.

Directed Verdict
Giammanco v. Lee, et al.
No. 19,827 Count I

It is submitted to the Court that the arrest of James Giammanco on May 9, 1967, for the robbery of the A & P store more than meets the standards as set forth in **Spinelli v. United States**, 393 U.S. 410, 216 L. Ed. 2d 638, 89 S.Ct. 584. The rule of the Spinelli case requires first, that the informer's report must be measured against the Aguilar's standards. The Aguilar's standards require that the informer be reliable with reasons for such reliability and there must be sufficient underlying circumstances from which the informer concluded that the person arrested had or was committing a crime.

The informant, who wanted to always talk to "Sgt. Rott" did in fact talk to Sgt. Weingart on three occasions, giving the address where a stolen camera could be located (A 89), where 40,000 in stolen money orders could be located (A 90), and the identity of a person who had stolen a typewriter, but the person who had stolen it was already in custody for the theft (A 104). It is submitted that the reliability and reasons for the reliability of the informant were impressed upon the minds of Sgt. Weingart and Capt. Lee at the time the tip was received. Had they been required to seek a warrant and such evidence of reliability of the informant was reduced to writing, the Aguilar test would have been met.

The next phase of the Aguilar test, that the informant concluded that Giammanco had robbed the A & P store is

the testimony of Sgt. Weingart. There is no doubt that he was informed that Giammanco was seen by the reliable informant running from the A & P store and get into a beat-up car (A 90). The objection of **Cochran v. United States**, 291 F. 2d 633, 636, of information from an unknown informer that defendant "may be good for a hold-up" was overcome by the testimony of Sgt. Weingart and probable cause existed for the arrest and viewing by the victim and release of Giammanco as soon as he could not be identified by the victim.

In **Caldwell v. United States**, 338 F. 2d 385 (CA 8th 1964), it was held by the Court that probable cause existed for an arrest of a holdup man. It further held, at page 389, that after a legal arrest, a person can be held in detention during the investigative stage of the case to permit witnesses to view the suspect.

Summary Judgment
Giammanco v. Lee, et al.
No. 19,827, Count II

In the second arrest of Giammanco by Capt. Lee and Sgt. Weingart on February 23, 1968, answers to interrogatories by Capt. Lee were to the effect that a female told him by telephone that bets are called in from a barber shop at Ninth and Delmar Streets at 12:30 p.m. every day. The circumstantial evidence was that there was a person on the phone in the barber shop with a small piece of paper in his hand which he concealed. Capt. Lee further answered due to his experience as a former member of the gambling squad, he reasonably believed Giammanco was phoning bets (Answers to Interrogatory 54 K 7; A 33). The issue of whether or not Capt. Lee's reasonable belief and the circumstantial evidence certainly was for the jury. In **Mulligan v. United States** (CA 8th 1966), 358 F. 2d 604, an arrest for gambling was held to be based on probable cause. It was held that betting tabs or memoranda of

bets are instrumentalities of the crime. It is submitted to the Court that the presence of Giammanco in the barber shop, the reputation of the barber shop as brought out at trial, and the reputation of Giammanco and the concealment of the slip of paper were sufficient to establish probable cause, and that such answers to interrogatories did not shut the door to a trial by jury.

Directed Verdict
Giammanco v. Lee, et al.
No. 19,827, Count II

The events preceding the arrest of Giammanco at the barber shop at 802 North Ninth Street were given by Capt. Lee. He learned that gambling activities were taking place there by surveillances of different persons. John Vitale would pick up Dave Cutter, drive him to Spring and Olive, pick up papers, then go to Grand and Olive, pick up other papers, then stop in other places in the City and terminate the trip at the barber shop (A 108). Five other persons who were arrested for gambling were frequenting the barber shop including Giammanco. The investigation of these activities culminated in the arrest of Dave Cutter, who was convicted on charges of interstate transportation in aid of racketeering (A 108).

On the morning of the arrest, Capt. Lee received a phone call from an unidentified female who sounded as if she were emotionally involved. She spoke of a gambling raid in South St. Louis and stated why don't you do something about the place on Ninth and Delmar. She told Capt. Lee that if you want to get the guy who is calling all the bets in, go to Ninth and Delmar at 12:30 and you will see him on the phone (A 109). At 12:30, Capt. Lee and Sgt. Weingart went to the barber shop and there was a man on the telephone, and after he turned around, they saw he was Giammanco. He hung up the phone hurriedly and had a piece of paper in his hand; he was placed

under arrest (A 110). The piece of paper had two phone numbers on it (A 110). Capt. Lee allowed him to keep the paper because if he seized the paper, Giammanco would be entitled to a phone call and the handbook would be moved; Capt. Lee felt if he could get the paper from Giammanco's property, he would be able to locate the handbook (Tr. 126). However, the paper was not found after Giammanco went to the men's room in the police station (Tr. 127).

Conclusion Regarding Summary Judgment and Directed Verdict

Respondents submit to the Court that the decision of the Eighth Circuit regarding summary judgment was not in conflict with the decisions of the Supreme Court of the United States or other Circuits. The answers to interrogatories in all four arrests left genuine issues of fact to be tried by a jury.

Respondents further submit that the decision of the Eighth Circuit regarding petitioner's motions for directed verdicts, under the facts of each arrest, was proper in that there were inferences from the evidence on which reasonable minds could differ as to whether the officers acted in good faith and with probable cause.

II

Whether Respondent Police Officers Could Rely on the Defense of Good Faith in Making the Arrests Especially When No Error Was Claimed in Submitting Such Issue to the Jury.

The Eighth Circuit Court of Appeals in its decision (A 5) footnote 2 points out that petitioners have claimed no error in submitting an instruction to the jury that good faith and probable cause is a defense to an action brought under 42 U.S.C., Sec. 1983. As shown in the preceding

argument on probable cause, there was enough evidence to properly submit the issue of probable cause and good faith to the jury, which in all cases found probable cause and good faith by their verdict in favor of all defendants in all cases. In **Marland v. Heyse**, 315 F.2d 312 (10th Cir. 1963), it was held that directed verdicts for defendants were improper and the issues of probable cause should have been submitted to a jury; see also **Beauregard v. Wingard**, 362 F.2d 901 (9th Cir. 1966); **Stringer v. Dilger**, 313 F.2d 536 (10th Cir. 1963).

Under the foregoing cases cited, it is submitted to the Court that there is no conflict between the decisions of the various Circuits and the decision of the Eighth Circuit and certiorari should not be granted on this issue.

CONCLUSION

It is respectfully submitted that the decision of the Eighth Circuit is not in conflict with the decisions of the other Circuits and the Supreme Court of the United States, that the decision of the Eighth Circuit is in keeping with the accepted and usual course of judicial proceedings and that the issues involved are not new or novel.

Respectfully submitted

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